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had a later opportunity to avoid hitting a sober man under the same circumstances then the inebriate can recover.<sup>24</sup> If the plaintiff is negligently walking over a bridge or a trestle where it is impossible to evade an oncoming train and the defendant's agent negligently runs over him the doctrine is applied.<sup>25</sup> This was the precise situation in the *Dent* case and the court correctly applied the last clear chance rule. Under the circumstances the deceased was just as powerless to prevent the accident as the plaintiff was in all the previous instances of damage to property, to a child, or to a sleeping individual. If the necessary elements are present, should it make any difference that the negligent plaintiff was hurt when he tried to avoid the injury by active efforts, but fell short of attaining success? Should he not be commended for his attempt rather than deprived of the invocation of the doctrine in his favor?<sup>26</sup>

Some decisions, as the recent case of *Tutweiler v. Lowery* (C. C. A. 6th Cir. 1922) 279 Fed. 479, have allowed recovery notwithstanding the fact that up to the time of the mishap the plaintiff could have escaped by the exercise of ordinary care, but was unaware of his danger.<sup>27</sup> The theory of these cases seems to be, not that the defendant had a later opportunity to avoid the injury, because he did not as a matter of fact, but that he had a chance to realize the plaintiff's ignorance of his peril. But this would also be true in many situations where contributory negligence is held to bar a recovery.<sup>28</sup> It may be possible to explain some of these cases on the ground that the defendant actually had a later opportunity, but the period of time of which it could consist would be practically negligible, and such a distinction is purely a formal attempt to reconcile contrary decisions.<sup>29</sup> Recovery in such cases, therefore, seems to be an unwarranted departure from the last clear chance doctrine.<sup>30</sup>

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**LIABILITY OF A CHARITABLE INSTITUTION FOR NUISANCES.\*—Founded on the early English case of *Heriots' Hospital v. Ross*,<sup>1</sup> the doctrine that a charitable**

<sup>24</sup> *McGuire v. Vicksburg, S. & P. R. R.*, *supra*, footnote 6.

<sup>25</sup> *Bogan v. Carolina Cent. R. R.*, *supra*, footnote 9.

<sup>26</sup> So also, if the plaintiff was in a situation from which it was impossible to escape, a recovery was allowed whether the plaintiff was in a stationary position; *Carrico v. West Virginia Cent. & P. Ry.* (1894) 39 W. Va. 86, 19 S. E. 571; *Inland & Seaboard Co. v. Tolson*, *supra*, footnote 14; or in motion, *Pilmer v. Boise Traction Co., Ltd.* (1908) 14 Idaho 327, 94 Pac. 432; *Norman v. Charlotte Electric Ry.* (1914) 167 N. C. 533, 83 S. E. 835.

<sup>27</sup> *Teakle v. San Pedro, L. A. & S. L. R. R.* (1907) 32 Utah 276, 90 Pac. 402; *Elliott v. New York, N. H. & H. R. R.* (1910) 83 Conn. 320, 76 Atl. 298; *Locke v. Puget Sound International Ry. & Power Co.* (1918) 100 Wash. 432, 171 Pac. 242; cf. with last case, *Scharf v. Spokane & I. E. R. R. Co.*, *supra*, footnote 14; *Bruggeman v. Illinois Cent. R. R.* (1909) 147 Iowa 187, 123 N. W., 1007.

<sup>28</sup> See cases cited *supra*, footnote 13.

<sup>29</sup> It should be noted that these decisions are all in cases against railroads and street railways because of the peculiar circumstances.

<sup>30</sup> As to a further extension under the Missouri Humanitarian Doctrine, see (1921) 21 COLUMBIA LAW REV. 485.

\* This note is concerned with the problems raised by the fact that the defendant is a body organized for charitable purposes, whether as a trust or corporation. For a discussion of the procedural difficulties which result if the charity is organized as a trust, see Stone, *A Theory of Liability of Trust Estates* (1922) 22 COLUMBIA LAW REV. 527.

<sup>1</sup> (1846) 12 Clark and F. 507, 8 Eng. Rep. 1508. This case held that a charitable trust was not liable for excluding a beneficiary from sharing in the benefits of a trust, and has no application to the case of a stranger being injured by a charity. However, the language of the court formed the basis of the so-called "trust fund" theory, that the funds of a charitable institution cannot be diverted to the payment of damages for its torts. This theory has been repudiated

institution is not liable for its torts, or those of its agents, has to some extent been adopted in most American jurisdictions. In the recent case of *Love v. Nashville Agricultural and Normal Institute* (Tenn. 1922) 243 S. W. 304, the defendant, a charitable corporation, sought to extend the rule of immunity to the case of a nuisance committed by the defendant in allowing its sewage to pollute water in the plaintiff's spring. In an action by the plaintiff to restrain the maintenance of the nuisance and to recover damages caused by it, the court, while declaring itself bound by the "trust fund" theory by previous decisions,<sup>2</sup> declined to extend the rule and granted the plaintiff both an injunction restraining the maintenance of the nuisance and damages. The court declared that the true basis of the exemption enjoyed by charitable institutions rests on public policy, not the "trust fund" theory.

A charitable organization may be restrained from maintaining a nuisance.<sup>3</sup> To hold otherwise would, in effect, deprive the plaintiff of property without due process of law. Agents of the government, such as counties,<sup>4</sup> municipalities<sup>5</sup> and even states<sup>6</sup> are not privileged to commit nuisances. In addition, the reasons which have been offered for holding a charity not liable for its torts in damages, do not apply where the plaintiff asks to have the further commission of torts restrained.

The instant case probably represents the weight of authority in holding the defendant liable for damages caused by the nuisance. Where the immunity claimed for charitable institutions has been repudiated<sup>7</sup> no defense could be presented. The majority of jurisdictions, however, grant to charities some form of limited immunity to tort actions. An examination of the decisions which have limited this immunity indicates that in those jurisdictions the party injured by a nuisance maintained by a charitable organization may take advantage of the limitation and recover damages. Thus many jurisdictions hold that a charity is liable to third persons<sup>8</sup> but not to beneficiaries<sup>9</sup> basing the exemption from liability on the ground of waiver of right by the beneficiary. Others hold that the charity is

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in England, *Hillyer v. St. Bartholomew's Hospital* [1919] 2 K. B. 820, and in Canada. See *Lavere v. Smith's Falls Public Hospital* (1915) 35 Ontario Law Rep. 98.

<sup>2</sup> *Abston v. Waldon Academy* (1906) 118 Tenn. 24, 102 S. W. 351 (holding that the defendant, a charitable trust, was not liable to a beneficiary for personal injuries caused by the negligence of its agents). The court in the instant case decided that the basis of this case could not be the trust fund theory, since a charitable organization had been held liable in damages for breach of contract. *Hall-Moody Institute v. Copass* (1907) 108 Tenn. 582, 69 S. W. 327.

<sup>3</sup> *Deaconess Home & Hospital v. Bontjes* (1902) 104 Ill. App. 484, *aff'd* (1904) 207 Ill. 553, 69 N. E. 748; *Kestner v. Homeopathic Medical & Surgical Hospital* (1914) 245 Pa. St. 326, 91 Atl. 659; *Herr v. Central Kentucky Lunatic Asylum* (1895) 97 Ky. 458, 30 S. W. 971 (*semble*).

<sup>4</sup> *Pierce v. Gibson County* (1901) 107 Tenn. 224, 64 S. W. 33.

<sup>5</sup> *Atlanta v. Warnock* (1892) 91 Ga. 210, 18 S. E. 135.

<sup>6</sup> *Missouri v. Illinois and Sanitary Dist. of Chicago* (1900) 180 U. S. 208, 21 Sup. Ct. 331.

<sup>7</sup> *Tucker v. Mobile Infirmary Ass'n* (1915) 191 Ala. 572, 68 So. 4; *Glavin v. Rhode Island Hosp.* (1879) 12 R. I. 411, abrogated by statute in respect to a hospital's liability to patients. R. I. Gen. Laws (1909) c. 213, § 38.

<sup>8</sup> *Kellogg v. Church Charity Foundation* (1911) 203 N. Y. 191, 96 N. E. 406; *Van Ingen v. Jewish Hospital* (1918) 182 App. Div. 10, 169 N. Y. Supp. 412, *aff'd* (1920) 227 N. Y. 665, 126 N. E. 924; *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 110 N. W. 954; *Marble v. Nicholas Senn. Hospital Ass'n* (1918) 102 Neb. 343, 167 N. W. 208; see (1907) 7 COLUMBIA LAW REV. 353.

<sup>9</sup> *Downes v. Harper Hospital* (1894) 101 Mich. 555, 60 N. W. 42; see *Marble v. Nicholas Senn. Hospital Ass'n, supra*, footnote 8, p. 344; (1918) 18 COLUMBIA LAW REV. 261.

not liable for the torts of its properly selected agents<sup>10</sup> but is liable for corporate negligence.<sup>11</sup> Others base the immunity on the ground that the charity is doing governmental work<sup>12</sup> on public policy<sup>13</sup> or on the "trust fund" theory.<sup>14</sup> It is apparent that in jurisdictions which have limited liability to injuries to third persons or to injuries caused by corporate misfeasance, the plaintiff may recover for damages caused by a nuisance since it is a corporate tort to third persons. Where the immunity is based on the fact that the charity is doing public work the charity ought to be held liable<sup>15</sup> since governmental bodies such as municipalities are liable for their nuisances.<sup>16</sup> Surely a private corporation doing public work should have no greater power than a governmental body. In those jurisdictions in which the absolute immunity of a charitable trust either on grounds of public policy<sup>17</sup> or on the "trust fund" theory<sup>18</sup> has been established, it seems that logically the plaintiff cannot recover in damages for the nuisance when the nuisance is maintained on property used for trust purposes.<sup>19</sup> But if the nuisance is maintained on property held by the charity for profit even though the profit be used for trust purposes, the plaintiff may recover.<sup>20</sup> There is a possibility that even in the former case, the plaintiff may recover, if not the amount that he was injured, at least the amount to which the defendant has benefited. A charitable institution is liable for its contracts,<sup>21</sup> and it seems that in the instant case, and in nuisances of a similar type in which benefit to the *tortfeasor* is involved,<sup>22</sup> the plaintiff may waive the tort and sue in quasi-contract. The privilege of waiving the tort and suing in contract has generally been limited to cases in which the defendant has added some tangible thing of value to his estate by the tort.<sup>23</sup> This view has, however, been

<sup>10</sup> See *Hoke v. Glenn* (1914) 167 N. C. 594, 595, 83 S. E. 807; (1901) 1 COLUMBIA LAW REV. 485.

<sup>11</sup> *Goodman v. Brooklyn Hebrew Orphan Asylum* (1917) 178 App. Div. 682, 165 N. Y. Supp. 949 (negligence in choosing agent); *Hewett v. Woman's Hospital Aid Ass'n* (1906) 73 N. H. 556, 64 Atl. 190 (not telling agent of a danger of his work); see (1907) 7 COLUMBIA LAW REV. 353; (1918) 18 COLUMBIA LAW REV. 261.

<sup>12</sup> *Morrison v. Henke* (1911) 165 Wis. 166, 160 N. W. 173.

<sup>13</sup> *Vermillion v. Woman's College of Due West* (1915) 104 S. C. 197, 88 S. E. 649; *Jensen v. Maine Eye & Ear Infirmary* (1910) 107 Me. 408, 78 Atl. 898; see *Magnuson v. Swedish Hospital* (1918) 99 Wash. 399, 407, 169 Pac. 829.

<sup>14</sup> *Loeffler v. Trustees of Shepard and E. P. Hospital* (1917) 130 Md. 265, 100 Atl. 301; *Fire Ins. Patrol v. Boyd* (1888) 120 Pa. St. 624, 15 Atl. 553; *Roosen v. Peter Brigham Hospital* (1920) 235 Mass. 66, 126 N. E. 392; see (1920) 20 COLUMBIA LAW REV. 708.

<sup>15</sup> *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 31 Sup. Ct. 654; cf. *O'Connell v. Merchants & P. D. T. Co.* (1915) 167 Ky. 468, 180 S. W. 845 (holding that even though the municipality was not liable, one doing work for it was); see (1911) 11 COLUMBIA LAW REV. 797.

<sup>16</sup> For a discussion of the liability of a municipality for nuisances, see a note to be published in the January, 1923, COLUMBIA LAW REV.

<sup>17</sup> See *supra*, footnote 13.

<sup>18</sup> See *supra*, footnote 14.

<sup>19</sup> *Deaconess Home & Hospital v. Bontjes*, *supra*, footnote 3.

<sup>20</sup> *Gamble v. Vanderbilt University* (1917) 138 Tenn. 616, 200 S. W. 510; *Winnemore v. Philadelphia* (1901) 18 Pa. Super. Ct. 625.

<sup>21</sup> *Hall-Moody Institute v. Copass*, *supra*, footnote 2; *Ward v. St. Vincent's Hospital* (1899) 39 App. Div. 624, 57 N. Y. Supp. 784.

<sup>22</sup> E. g., in the instant case the defendant was saved the expense of properly disposing of its sewage.

<sup>23</sup> *Phillips v. Homfray* (1866) 24 Ch. Div. 439; *B. F. Avery & Sons v. McClure* (1909) 94 Miss. 172, 47 So. 901; *Schillinger v. United States* (1894) 155 U. S. 163, 15 Sup. Ct. 85 (abrogated in part by statute, (1910) 36 Stat. 851, U. S. Comp. Stat. (1916) § 9465); contra, *McSorley v. Faulkner* (1892) 18 N. Y. Supp. 460.

criticized on the ground that quasi-contract lies where there has been a benefit to the defendant and a loss to the plaintiff,<sup>24</sup> and has not been universally followed.<sup>25</sup>

**THE NATURE OF A STOCKHOLDER'S INTEREST IN THE REAL ESTATE OF THE CORPORATION.**—Section 2 of the California Alien Land Law of 1920 prohibits citizens of Japan from acquiring or possessing any interest in agricultural land. The penalty for violation of this Statute is that such an interest shall escheat to the state. The plaintiff, a Japanese citizen, acquired 28 shares of the capital stock of a corporation which owned a large tract of California land devoted to agricultural purposes. In an action in equity to restrain the Attorney General of California from confiscating the plaintiff's holdings, the question considered was whether the ownership of this stock was such an interest in real property as to bring the plaintiff within the prohibitory provisions of the Act. The court answered the question in the affirmative and refused to grant the injunction. *Frick v. Webb* (D. C. N. D. Cal. S. D. 1922) 281 Fed. 407.

No attempt is made by the court to support its holding either by reason or authority. And it would seem that in the light of established legal principles such an attempt would be futile. Shares of stock are not real property.<sup>1</sup> They are in the "nature of contract rights or choses in action" with many of the attributes of personal property.<sup>2</sup> Title to the corporate property is in the corporation;<sup>3</sup> so also is the right to control and manage it.<sup>4</sup> A member or stockholder is in no sense a tenant in common or a co-owner.<sup>5</sup> He can acquire corporate property only through a corporate act,<sup>6</sup> and cannot claim it in case of the corporation's insolvency.<sup>7</sup> Even though he be the sole stockholder he does not own, nor can he sell or dispose of the property of the corporation or bind it by his agreement,<sup>8</sup> or maintain replevin for its personality in his own name.<sup>9</sup> Apart from the stock itself he has no interest in the corporate assets which is capable of assignment.<sup>10</sup> His interest as a stockholder does not pass to the mortgagee under a general mortgage secured by all the corporate property.<sup>11</sup> Thus the interest of a stockholder is of a collateral nature and not that of an owner.<sup>12</sup>

The stockholder no doubt has an "interest" in the sense that he is "interested" in the property of the corporation. Thus he can prevent waste or abuse of it, require its protection by those in control,<sup>13</sup> and insure it.<sup>14</sup> Such interests

<sup>24</sup> See Keener, *Quasi Contracts* (1893) 165; Woodward, *Quasi Contracts* (1913) § 275.

<sup>25</sup> *McSorley v. Faulkner*, *supra*, footnote 23.

<sup>1</sup> *Bligh v. Brent* (1837) 2 Y. & C. Ex. 268.

<sup>2</sup> See *Bellows Falls Power Co. v. Commonwealth* (1915) 222 Mass. 51, 57, 109 N. E. 891.

<sup>3</sup> See *United States Trust Co. v. Heye* (1918) 224 N. Y. 242, 253, 120 N. E. 645.

<sup>4</sup> *Sellers v. Greer* (1898) 172 Ill. 549, 50 N. E. 246.

<sup>5</sup> See *Humphreys v. McKissock* (1891) 140 U. S. 304, 312, 11 Sup. Ct. 779; *Rothchild v. Memphis & C. R. R.* (C. C. A. 1902) 113 Fed. 476, 479.

<sup>6</sup> See *United States Radiator Corp. v. State of New York* (1913) 208 N. Y. 144, 152, 101 N. E. 783.

<sup>7</sup> *Sanborn-Cutting Co. v. Paine* (C. C. A. 1917) 244 Fed. 672; *Boynton v. Roe* (1897) 114 Mich. 401, 72 N. W. 257.

<sup>8</sup> See *Watson v. Bonfils* (C. C. A. 1902) 116 Fed. 157, 167.

<sup>9</sup> *Button v. Hoffman* (1884) 61 Wis. 20, 20 N. W. 667.

<sup>10</sup> *Cotten v. Tyson* (1913) 121 Md. 597, 89 Atl. 113; *contra*, *Fetzer v. South Side Lumber Co. of Chicago* (C. C. A. 1913) 202 Fed. 878.

<sup>11</sup> *Humphreys v. McKissock*, *supra*, footnote 5.

<sup>12</sup> See *City of Utica v. Churchill et al.* (1865) 33 N. Y. 161, 238.

<sup>13</sup> *Duquesne Co. v. Glaser* (1909) 46 Colo. 186, 103 Pac. 299.

<sup>14</sup> *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C. 1884) 21 Fed. 778.